



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

YALE LAW JOURNAL

VOL. XI

NOVEMBER, 1901

NO. 1

YALE MEN AS WRITERS ON LAW AND GOVERNMENT.

An American bar was not really in existence before the Revolution. Great causes in which the colonists were interested were occasionally argued at Westminster or before the King in Council, but they were generally in the hands of English barristers. One of the first American lawyers who ever argued before the latter tribunal* was William Samuel Johnson of Connecticut (Yale, Class of 1744), a silver-tongued orator, and one of the Committee on Style, which put the constitution of the United States in its final form, but who has left no published works to perpetuate his name.† His appearance was in the *Mohegan case*, involving important landed interests in Connecticut, heard at London in 1767, and he had been made, the year before, a Doctor of Civil Law by the University of Oxford.

There could be no legal literature in America until our law took a shape of its own, and came to be cultivated as a science. To this Independence opened the door.‡ Removing the possibility of any appeal from American to English tribunals, it gave the lawyers of that day a fair field to work out an orderly system of jurisprudence,

*Beardsley, *Life and Times of William Samuel Johnson*, 47.

†His dispatches as Colonial Agent at London for Connecticut, to its governor, which are published in the *Trumbull Papers* by the Massachusetts Historical Society, show great power of observation and judgment.

‡See *Two Centuries' Growth of American Law*, 13, 17.

which, while it ordinarily followed the Common Law, should follow it only so far as it was suited to the rough conditions of new settlements in a new world.

The year after the Declaration of Independence, Nathaniel Chipman was graduated from Yale in the class of 1777, and may rank as the senior among her legal authors. He published in 1793 *Sketches of the Principles of Government*, (1789-1791), and *Reports and Dissertations*. The former is clear and well-ordered in its statement and arrangement. He was Chief Justice of Vermont, and Judge of the United States District Court there; revised the statutes of the State twice, and was Professor of Law at Middlebury College from 1816 till his death in 1843. While holding this position, he published a well-considered *Treatise on Free Institutions*, 330 pp. (Burlington, 1833.)

In the succeeding class (1778) was Chief Justice Swift of Connecticut, an original thinker, with a mind of much analytic power. In 1795 and 1796, he published his *System of the Laws of Connecticut*, followed and superseded in 1822 and 1823 by his *Digest of the Laws of Connecticut*. These works are of much more than local interest. There was little to differentiate the law of Connecticut from that of other States, except as respects some peculiarities in her political constitution which, until 1818, rested on the ancient charter granted her in 1662 by Charles II. Swift's Digest was an American Blackstone (far superior, indeed, to Blackstone in its treatment of Equity), and was long used to a considerable extent all over the United States, both in legal instruction and as an authority before the Court. He also published, in 1810, the first American treatise on Evidence, together with a short work on Bills of Exchange and Promissory Notes.

Noah Webster was a class-mate of Swift, and also studied law, though most of his life was devoted to education and philology. In 1784 he published *Sketches of American Policy*, the first strong plea for a national government for the people of the United States, and in 1802 an important treatise on Blockade and the Rights of Neutrals.

Of the class of 1781, the youngest member, and the greatest, was Chancellor Kent. He was from the first a student of literature, and possessed to a remarkable degree the absorbent power. "It was the common remark of his companions," wrote one of his classmates, long afterwards, "that they could generally tell the author he last

read by the style and matter of his next composition.”* A year after graduation he wrote to this same classmate, both being then students of law, that this seemed to him “a field which is uninteresting and boundless,” and the study of it “so encumbered with voluminous rubbish and the baggage of folios that it requires uncommon assiduity and patience to manage so unwieldy a work.”† It was his good fortune to do more than any other man ever has done or ever can do to free American law from that reproach. An opportunity came to him which can never recur. At a day when American institutions were plastic and undeveloped, yet ripe for philosophic explanation and the confirming touch of some strong co-ordinating hand, that could both prune and graft the growing tree, Kent published his *Commentaries on American Law*.

Retired from the bench at the age of sixty by an absurd provision of the then existing Constitution of New York, he became Professor of Law at Columbia College, and soon worked up his lectures into these four historic volumes.

Kent was not merely a great lawyer. He was a scholar and a philosopher. For many years he had given to studies outside of law the larger portion of his time. “In the morning,” to quote his own words, “till half past eight I read Latin; then Greek until ten. Then I gave myself up to law or business until the afternoon, and after two hours’ attention to French, I concluded the rest of the day with some English author.”‡

His earliest publications were made in connection with his first acceptance of the chair of Law at Columbia, and consisted of three of his college lectures, styled *Dissertations*. It was the first American law book ever cited in an English law book.§ But the American lawyers and students were not ready to receive it. Kent was met during his first year at Columbia by a class of seven, and during his second year by a class of but two. The third year opened, and there was not a single one who appeared. || The professorship was promptly resigned, to be resumed, as has been stated, later (in 1823), under more auspicious circumstances. His *Commentaries* have run through fourteen editions, and, as Charles Sumner wrote

*Memoirs and Letters of Chancellor Kent, 10.

†Memoirs and Letters of Chancellor Kent, 16.

‡Ibid, 27.

§Ibid, 63. This English law book was Brown’s *Treatise on the Civil and Admiralty Law*.

||Memoirs and Letters of Chancellor Kent, 77.

him in 1836, "have now become the manual of the practitioner, as they have, since their first publication, been the institute of the student."* "This work," said Chief Justice Daggett, formerly a professor in the Yale Law School, "I cherish with more affection than any other except the Bible and Shakespeare."†

At the close of the Revolution, a young soldier from the Continental army entered Yale, to whom, though want of money soon called him off to other pursuits, she gave the honorary degree of Master of Arts in 1787. This was Ephraim Kirby, the author of the first volume ever published of American Law Reports. It was printed at Litchfield in 1789.

It is difficult for the modern lawyer to estimate the service thus rendered by Kirby to his profession.

For want of any authoritative record of them, judicial precedents were then few and of little weight. Every court was a law unto itself. The judges often had little or no legal education. They made their rulings as jurymen give their verdicts, by the exercise of common sense. Judicial opinions in most of the States were not given in writing, and were never preserved.

Not until 1798 was this practice changed in New York, and it was then due wholly to the influence and example of Kent. ‡ He also was the pioneer among American judges in the use of illustrations from the civil law. The politics of the time happily favored this. He has thus stated the way in which he was able to introduce it into the opinions of his State: "I made much use of the *Corpus Juris*, and as the judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them. I could generally put my brethren to rout and carry my point by my mysterious wand of French and civil law. The judges were Republicans and very kindly disposed to everything that was French, and this enabled me, without exciting any alarm or jealousy; to make free use of such authorities and thereby enrich our commercial law." §

For work like this of Kent, Kirby prepared the way. The American reporter has made the American judge. He holds every court of last resort up to its duty. He in effect prohibits the preparation of slovenly and ill-considered opinions. They may be poor,

*Memoirs and Letters of Chancellor Kent, 203.

†Ibid, 217.

‡Ibid, 114.

§Memoirs and Letters of Chancellor Kent, 117. Cf. *Ibid*, 58.

but they will seldom fail to be the best which the judge who writes them has to give.

In another point of view, Kirby was the Pandora who opened the fatal box. The immense multiplication of American reports, which now comprise over twenty thousand cases a year, has become a great and spreading evil. Yet Pandora was able to shut the box in time to keep one lingering inmate within. It was Hope. A place higher than Kirby's is reserved for the reporter who can induce his court to keep back from the printer so much of every opinion as contributes nothing to the strengthening, the explanation, or the development of the law. It may well be the hope of the bar that such men will yet be found, to stem the tide that now overflows our libraries with wearisome repetitions of settled rules, smothered in petty details of some petty transaction, interesting only to the parties to a particular law suit and their two attorneys.

The class of 1788 also produced one of the leading American reporters, William Johnson, whose work for the courts of New York ably supplemented that of Kent, and who has also enriched our legal literature by a translation of the scholarly work of Azuni on *Mari-time Law*.

Three years later Yale sent out James Gould, so long the mainstay of the earliest American Law School. Without a charter of incorporation, in a frontier hill town, with no endowment, the Litchfield Law School drew to itself students from almost every State of the Union, over a thousand during its half-century of existence, brought largely to listen to his clear and systematic presentation of the law. His treatise on Common Law *Pleading*, containing the substance of his lectures on that topic, remains still the most accurate and logical statement of this branch of procedure in the English language. It is a classic monument to a dead science.

In 1797 Henry Baldwin was graduated from Yale, and was in the first class taught by Gould at Litchfield. He published, forty years later, while on the bench of the Supreme Court of the United States, "*A General View of the Origin and Nature of the Constitution and Government of the United States*." This was one of the earliest statements in book form of the Jeffersonian or Democratic theory of the Union. Thomas Day was in the same class, one of the most successful of American reporters through almost half a century.

The valedictorian of the class of 1804 was John C. Calhoun, Vice-President of the United States. His life was rather that of a states-

man than of a lawyer; but towards the close of it he found time to write *A Disquisition on Government* and *A Discussion on the Constitution and Government of the United States*, which put him in a high place as an original contributor to the philosophic study of our political institutions.

The most enduring law writings are well reasoned and well stated judicial opinions of courts of last resort. They become part of the law of the land. They are still familiarly known to the bar after the lapse of centuries. The lawyer must be acquainted with their premises; the people must respect their conclusions. Of such opinions Yale men have contributed many to the literature of the profession.

One of her sons was for fourteen years chief justice of the United States. Waite did not rank in grasp of mind with Marshall or Taney, but his opinions are clearly put and his conclusions sound. It fell to him to construe the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and especially in respect to the laws passed by Congress to uphold the exercise of the elective franchise by the Southern negro. It was a question of doubt and difficulty. The master key to the problem was forged by his hand. It was the principle which he laid down in *Minor v. Happersett*, 21 Wall., 162; and more at length in *United States v. Reese*, 92 U. S., 214, and *United States v. Cruikshank*, 92 U. S., 542; that these amendments are not grants, but guaranties of existing rights, adding nothing to those privileges and immunities previously possessed by one citizen against another. Another opinion from his pen, which has had a profound influence on the social economy of the country, was that in *Munn v. Illinois*, 94 U. S., 113, the most important of the "Granger Cases," in which he applied to modern conditions Lord Hale's maxim, that when private property is affected with a public interest, it ceases to be *juris privati* only.

Many Yale graduates have been chief justices of State and territorial courts, and many more associates upon the Supreme bench of the United States or of the States of which they were citizens. It would require more space than can be given to this article to state their contributions to the development of American law, from the days of Chief Justice Smith in colonial New York to the judgment rendered this year at Washington in the *Insular Cases*, in which, of the three Yale men now constituting a third of the Supreme Court, one sided with the chief justice in holding that wherever the sovereignty of the United States extended the Constitution governed its

exercise, one took what perhaps may be called an opposite view, and one, holding the balance of power, but agreeing in his line of reasoning with none of his associates, delivered the judgment but not the opinion of the court.

The Opinions of the Attorneys General of the United States also contain contributions to constitutional law and discussions of the nature of our system of government of considerable importance, by sons of Yale—Alphonso Taft (class of 1833), William Maxwell Evarts and Edwards Pierrepont (class of 1837), and Wayne MacVeagh (class of 1853).

So our Blue-books show that Yale men, who have been secretaries of State, have, by their reports and dipsatches, helped both to confirm and broaden the foundations of international law. Whoever has occasion to consult Wharton's *Digest of the International Law of the United States* cannot fail to notice how frequently he quotes the words of John C. Calhoun (class of 1804), John M. Clayton (class of 1815), and William M. Evarts (class of 1837).

The author of the work to which reference has just been made, Francis Wharton, LL.D. (class of 1839), compiled it while himself attached to the Department of State in the office of Solicitor. It is one of the most useful of his many writings, but his varied learning and comprehensive grasp of whatever subject he took in hand appear more conspicuously in his treatise on the *Conflict of Laws*. His work on the *Criminal Law of the United States* has also a deservedly high reputation, and all students of American history feel their indebtedness to him for his entertaining volume on the *State Trials of the United States During the Administrations of Washington and Adams*.

Thus far mention has been made only of those who were practicing lawyers. But our legal literature and American public law have been enriched by several Yale men who were of other professions.

First may be named Manasseh Cutler of the class of 1765. Though educated for the bar and actually admitted to it, he spent his life mainly in the ministry. He was one of the Ohio Company, formed in 1786, which bought of the United States a million and a half acres of their unsettled territory northwest of the Ohio river. Nathan Dane was formerly deemed the author of the immortal ordinance of 1787, which ineradicably stamped free soil and free schools upon this great domain; but it seems now established that Dane did little more than introduce and advocate before Congress what Cutler wrote. It is one of the great State papers of American history, and

shaped for all time the political institutions of some of our largest States, where it was long regarded as a sort of Constitution, whose binding force outlasted the Territories it was made to govern.

Another Yale clergyman, who also originally studied for the bar, in the following century rendered important service in explaining and systematizing the law of nations. Theodore Dwight Woolsey, of the class of 1820, the last President of Yale College, and under whose lead it grew into Yale University, published in 1860 his *Introduction to the Study of International Law*, an institutional book of special value in legal education, and which has been used for that purpose in University instruction on both sides of the Atlantic. It has also been translated into Chinese, at the Imperial College of Peking. Later he published a work on *Political Science*, which ranks as a standard authority, and must be consulted by any one who wish to get a clear conception of the political framework of ancient Greece, or medieval Italy.

Elisha Mulford of the class of 1851, also a clergyman, in his work on "*The Nation*," has set forth a theory of our government, striking in form, and profound in its philosophy.

The simplest and most attractive introduction to the study of Roman Law, yet written, was also the work of a Yale graduate, who was not a lawyer. This was Professor James Hadley of the class of 1842, a universal scholar, who was the father of the present President of the University. The book is the outgrowth of a course of lectures prepared originally for the college students, and from 1870 delivered annually at the Yale Law School.

Another work of similar origin is the treatise on *Elementary Law* by Professor William C. Robinson, LL.D., originally (1874) published at New Haven by the Law Department, and since made one of the "Students' Series." Professor Robinson is only an honorary graduate of Yale (M. A., 1881), but this article would be incomplete did it not name this notable contribution to institutional legal literature, the fruit of his long and successful labors as one of the Faculty of the Yale Law School.

No mention is here made of the publications of alumni of the School on legal subjects. They are stated in the bibliography which follows, and are left to speak for themselves. Nor has any attempt been made to state all the contributions to legal literature by Yale men, who were not educated at the Yale Law School. Only those have been described which seemed of the first importance, either from their subject, or the style of treatment, or the authority which they have attained.

Simeon E. Baldwin.